IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of case

Jail Appeal No. 698/2001
(Old No. 2847/1999)

Banwari

Vs

State

Date of decision: 17-11-04

For the approval of:

Hon'ble Mr. Justice J. C. S. Rawat

- Whether the order/judgment should be sent to the reporters for reporting? Yes

- Whether the reporter be allowed to see the judgment? Yes

Dated- 17-11-04
LSR

IN HIGH COURT OF UTTARANCHAL

AT NAINITAL

JAIL APPEAL NO.698 OF 2001

(Old No. 2847/1999)

Banwari S/o Puran Lal,
R/o Tanakpur P.S. Tanakpur
District Udham Singh Nagar. ----------
Appellant

Versus

State of Uttaranchal ---------- Opposite Party

Ms. Pushpa Joshi, learned Amicus Curiae for the appellant.
Mr. G. S. Sandhu learned A.G.A. for the State.

HON'BLE J. C. S.RAWAT, J.

1. This is a criminal Appeal preferred by appellant Banwari Lal against the judgment and order dated 20.11.1997 passed by Sri. R. K. Sharma, the then II Addl. Sessions Judge, Nainital by which he convicted the appellant u/s 8/20 Narcotic Drugs and Psychotropic Substance Act, 1985 (for the short 'N.D.P.S. Act') and sentenced him for 10 years rigorous imprisonment and a fine of Rs. one Lac. In default of payment of fine the appellant shall undergo two years R.I.

2. In nut shell the prosecution case is that on 25.09-1993 S.O. Devendra Singh Digari (PW-1) alongwith Head Constable Ramesh Ram (PW-2) were on patrol duty. When they reached half kilometer from Canal Colony gate in the south they saw a person coming on foot. Seeing the police party the appellant hesitated and was pretending to urinate 5 paces away from the road. At 07:20 a.m. the police on suspicion, stopped that person and asked his name and address. He told his name as Banwari Lal S/o Puran Lal R/o Tanakpur, District Udham Singh Nagar. On search a bundle of 350 grams of Charas covered with polythene was

recovered from his right pocket of his Pant. On enquiry the appellant stated that he had brought that Charas from Chandni (Nepal) for which he had no license. The appellant was asked by the police whether he wanted to get his search made before a Gazetted Officer or a Magistrate but he denied to avail of that right. The appellant was arrested and the recovered contraband was sealed on the spot and recovery memo (Ex.Ka-1) was prepared on the spot. As the recovery was made suddenly and the place of recovery being lonely no public witness was available. The appellant and the recovered articles were brought to the police station Banbasa where S.O. lodged F.I.R. (Ex.Ka.2) on the same day at 08:30 a.m. and a case u/s 15/20 N.D.P.S. Act was registered against the appellant. After completing the formalities of investigation charge-sheet (Ex.Ka-6) was submitted against the appellant by PW3 S.I. Prakash Chandra Mathpal.

3. Charge was framed against the appellant U/s 8/20 N.D.P.S. Act to which he pleaded no guilty and claimed to be tried.

4. The prosecution in support of its case examined PW1 Devendra Singh Digari S.O. who was the head of the police party and proved recovery memo Ex Ka 1, PW2 Ramesh Ram Head Constable who was also the member of the police party and PW3 S.I. Prakash Chandra Mathpal who investigated the case and submitted charge-sheet Ex Ka 6 against the appellant.

5. The appellant in his statement U/s 313 Cr.P.C. denied the prosecution allegations and stated that he has been falsely implicated in the case. He was arrested from his house.

6. On appreciation of evidence on record the learned trial court found the appellant guilty U/s 8/20 N.D.P.S. Act and convicted and sentenced the appellant as above.

7. I have heard the learned counsel for the parties and perused the evidence on record.

8. In support of its case the prosecution examined PW-1 Devendra Singh Digari S.O. and PW-2 Ramesh Ram Head Constable who were the members of the patrolling party. They supported the prosecution story and narrated as indicated in para no. 2 of this judgment.

9. As regards section 45 of N.D.P.S. Act the learned counsel for the defence submitted that PW-1 Devendra Singh Digari had not recorded the information in respect of the appellant being involved before proceeding to arrest him in this case. This constitutes violation of section 42 of the N.D.P.S. Act. It is true that section 42 (1) provides that the officer concerned when he has reason to believe from his personal knowledge or information received from any person he is obliged to take in down in writing. If such information constitutes an offence punishable under the provisions of N.D.P.S. Act and send it forthwith to the immediate superior officer. In construing any facts to find out whether the prosecution has complied with the mandate of any provision, which is mandatory, the court has to examine it with caution. The law under the N.D.P.S. Act being stringent to the person involved in the field of illicit drug, traffic, the legislature time and again has made some of its provisions obligatory for the prosecution to comply which the courts have interpreted it to be mandatory. The courts while

construing such provisions should not interpret so literally so as to render its compliance impossible. However before drawing such inference by the court it should be examined with caution and circumspection. In other words if in a case the following of the mandates strictly result in delay in trapping an accused which may lead the accused to escape then the prosecution case should not be thrown out.

10. In the instant case the police party was on patrolling duty. When they reached half kilometer from canal colony gate in the south they saw the appellant coming on foot. On seeing the police party the appellant hesitated and the police apprehended the appellant and conducted the search of his person. There was a chance recovery of the contraband. If during such search or arrest there was a chance recovery of any contraband then the police officer should inform the empowered officer who should thereafter proceed in accordance with the provisions of N.D.P.S. Act. If he happens to be an officer empowered to conduct the search and arrest of the accused then he can from that stage onward should carry out the investigation in accordance with the provisions of N.D.P.S. Act. The appellant was apprehended on the spot and search of his person was made immediately. Had the police party not done so immediately the opportunity of seizure and arrest of the appellant would have been lost. After the arrest the seizure memo was prepared and the appellant was brought to the police station along with the contraband where the F.I.R. was recorded and the contraband article was kept in the malkhana. PW-1 Devendra Singh Digari has categorically stated in his examination-in-chief that immediately after the arrest

he informed his superior officer through wireless. PW-2 Head Constable Ramesh Ram had also stated in his cross-examination that the information was sent by wireless to the superior officer. According to the provisions of section 42 of N.D.P.S. Act the arresting officer has to send the information forthwith to his superior officer. By sending the wireless message by the officer in-charge of the police station to the superior officer is the substantial compliance of the said section. Apart this the appellant was produced before the Magistrate on the same day for the remand. A perusal of the original record reveal that the copies of the relevant documents were sent to the Magistrate concerned who perused the said papers and thereafter the remand was granted. The case diary of the said offence is also with the original record on which the learned Magistrate has made endorsement and signed on it on 25-09-1993.

11- The learned defence counsel submitted that there is no compliance of section 57 of the N.D.P.S. Act. He submitted that it is under obligation on the prosecution that while making arrest or seizure the officer should make full report of all the particulars of such arrest or seizure and sent it to his immediate superior officer within 48 hours of such arrest of seizure. He further submitted that non-compliance of aforesaid provisions vitiates the entire trial. In the present case it is proved that there is no evidence to the effect that any written report was sent to the superior officer except that a report was sent to the Magistrate. The copy of the FIR and other relevant documents were sent to the Magistrate concerned and a wireless message was sent to the superior officer regarding the arrest the seizure of the contraband article. This construes a substantial

compliance and mere absence of any such report cannot be said prejudice to the appellant. When substantial compliance has been done it would not vitiate the prosecution. It has been held in **State of Punjab vs. Balbir Singh (1994) 3 Supreme Court Cases 299,** that the provisions of sections 52 and 57 of N.D.P.S. Act which deal with the steps to be taken by the officers after making arrest or seizure under sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc., then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merit of the case.

12- The learned counsel for the defence assailed the findings of the learned trial court and submitted that the mandatory provisions of section 50 of N.D.P.S. Act have not been complied that the appellant had been searched first of all and thereafter he was informed of his valuable rights to be searched before a Gazetted Officer or a Magistrate. To support the contention attention was drawn to the evidence of PW-1 and PW-2 as well as the memo of arrest and seizure. No doubt the appellant was informed of his valuable rights being searched before a Gazetted Officer or a Magistrate after his search. In the present case the police party was on patrol duty. when the appellant was apprehended the police party had no knowledge or information that the appellant was carrying the contraband. The appellant was suddenly apprehended and as a chance the contraband was recovered from his possession. It should be kept in mind that on prior information the empowered officer or authorized officer while acting

under sections 41 (2) or 42 should comply with the provisions of section 50 before the search of the appellant is made and such person should be informed that if he so requires, he should be produced before a Gazetted Officer or a Magistrate as provided there under. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial after being so informed whether such person opted for such a course or not would be a question of fact. In the instant case there was no prior information with the police party that the appellant would be carrying contraband at the place of occurrence. The appellant was arrested on suspicions and the search was made suddenly and therefore it cannot be expected that the mandatory provision of section 50 has not been complied with. The appellant has admitted his sudden arrest in the statement u/s 313Cr.P.C. As such the submission of the learned counsel for the defence is not tenable.

13- The learned counsel for the defence further contended that the prosecution has failed to prove as to how the sample for the chemical examination was taken from the sealed packet of the seized contraband. The learned A.G.A. refuted the contention. The Investigating Officer has clearly stated in his cross-examination that he sent the sample of the contraband to the chemical-examiner. He has further stated that he produced the sealed bundle of the contraband before the session court and the contraband was opened before the court and the sample was taken in

the court and was thereafter sent to the chemical examiner Agra. He has further stated that he sealed both the bundles and the seal of the court was affixed on both the bundles. The report of the chemical-examiner further reveal that the sample was received by him and the seal was affixed of the sessions court. Thus, it is amply proved by the prosecution evidence that the said bundle was sent to the chemical-examiner and it was found that it was Charas. The contention of the learned defence counsel is not sustainable.

14- The learned defence counsel further submitted that the appellant was arrested on 29-09-1993 at about 7:30 a.m. on the road and the prosecution could have taken the public witnesses for the said recovery. The learned A.G.A.refuted the contention. The prosecution has established by the evidence that the police party was on patrol duty and the appellant was arrested suddenly and there was no chance to take the public witnesses. The recovery memo Ex. Ka-1 clearly indicates that the public witnesses could not be procured at the spot as there was a sudden arrest of the appellant and it was an isolated place. During cross-examination it has been categorically stated by both the witnesses that the place from where the appellant was apprehended which was adjacent to the Jungle. This aspect was also considered by the learned court below and no independent person was present the learned trial court thought it fit to place reliance upon the evidence of the police officers. The appellant was found carrying the contraband as indicated above. It appears from the evidence of PW-1 Devendra Singh Digari that no public witness was available at the time of arrest of the appellant and it was an isolated place. Therefore not procuring the independent witnesses at

that time does not reflect adversely upon the prosecution evidence.

15. In view of the above discussion, I am of the view that the learned trial court has rightly found the appellant guilty u/s 8/20 of the N.D.P.S. Act and no interference need to be required by this court. The conviction and sentence awarded by the trial court are maintained. The appeal lacks merit and is dismissed.

16- Let a copy of this judgment alongwith the record of the case be sent to the trial court for needful compliance under intimation to this court within two months positively.

(J.C.S.RAWAT, J.)

NOVEMBER 17, 2004